No. 12,559

IN THE

United States Court of Appeals

For the Ninth Circuit

MOORE EQUIPMENT CO., INC. (a corporation),

Appellant,

vs.

JOHN O. ENGLAND, as Trustee of the Estate of Ted E. Fisher and Maxeen R. Fisher, Bankrupt,

Appellee.

Appeal from the United States District Court, Northern District of California, Northern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellee, a Trustee in Bankruptcy, commenced an action in the United States District Court to set aside a voidable preference received by Appellant, under the provisions of section 60b of the Act of Congress Relating to Bankruptcy. (11 United States Code 96b.) Appellee received judgment and Appellant moved for a new trial. This motion was denied by the District Judge and a written Opinion was filed which could well be adopted as Appellee's brief. (Transcript of

Record, pp. 23-28.) An appeal was perfected by Appellant pursuant to Title 28 United States Code 1291.

The case was tried on the basis of a Stipulation of Facts (T.R. pp. 9-13) and an Amendment thereto (T.R. p. 12). The statement of facts in Appellant's brief omits that portion of the facts which were set fourth in the Amendment to the Stipulation of Facts, to-wit, that at the time the Defendant repossessed the property from the Bankrupt, said Bankrupt was insolvent and said Defendant had reasonable cause to believe that on said date the said Bankrupt was insolvent. (T.R. p. 14.) With this exception Appellant's Statement of Facts is fair and complete.

STATEMENT OF THE CASE.

There is only one issue of law raised in the instant case. Where inanimate personal property mortgaged by a resident of this state has been moved from the county in which it is situated, and remains out of said county for more than thirty days, thus exempting said property from the operation of the mortgage, is the lien of the mortgagee irrevocably lost until the provisions of sections 2965 and 2966 of the Civil Code of California are complied with by mortgagee either recording the mortgage in the county to which the property has been removed or taking possession of the property and disposing of the same as a pledge for the payment of the debt?

ARGUMENT.

I.

"THE AUTHORITY FOR THE CREATION OF A CHATTEL MORTGAGE IN THIS STATE DERIVES ITS SOURCE FROM STATUTORY ENACTMENTS AND ALL RIGHTS ACCRUING BY VIRTUE OF SUCH MORTGAGES CAN BE PROTECTED AND PRESERVED ONLY BY FULLY MEETING THE REQUIREMENTS OF THE STATUTE AND STRICTLY OBSERVING ITS PROVISIONS."[1]

Appellant's first point is merely a restatement of a portion of the Stipulation of Facts. The validity of the chattel mortgage prior to the removal of the property from San Joaquin County is not questioned.

Appellee also agrees with Appellant's second point—that after the property was permitted to remain out of San Joaquin County for more than thirty days the property was exempted from the operation of the mortgage.

Appellant's third point is really the only point raised on the appeal: whether Appellant complied with the provisions of sections 2965 and 2966 of the Civil Code of California? These provisions and their interpretation formed the basis of the decision in the District Court and are as follows:

> "Sec. 2965. (Mortgaged personal property, effect of removal.) When personal property mortgaged (other than animate personal property mortgaged by a resident of this state, and motor vehicles and other vehicles defined in and the mortgaging of which are regulated by the California Vehicle Act), is removed from the county

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[1]Opinion of Trial Judge. (T.R. p. 24.)

in which it is situated, the lien of the mortgage shall not be affected thereby for thirty days, after such removal; but, after the expiration of such thirty days, said property mortgaged, is exempted from the operation of the mortgage, except as between the parties thereto, until either:

"1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

"2. The mortgagee takes possession of the property as prescribed in the next section. (Enacted 1872; Am. Stats. 1909, p. 44; Stats. 1923, p. 139; Stats. 1935, p. 2227.)"

"Sec. 2966. (Mortgagee may take possession and sell property as pledge, when.) If the mortgagor voluntarily removes or permits the removal of the mortgaged property, save in the case of animate chattels mortgaged by a resident of this state, from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due. (Enacted 1872; Am. Stats. 1923, p. 140; Stats. 1935, p. 2227.)"

What did Appellant do after the property was in Stanislaus County for more than thirty days? It merely took possession of the property and proceeded to sell the *same under the power of sale contained in the mortgage.* (Italics ours.) It did not even make an attempt to proceed pursuant to sections 2965 and 2966. (Stipulation VII, T.R. pp. 11-12.) The taking of possession was pursuant to the remedies given by the mortgage on default and was only coincidentally a

compliance with a portion of the provisions of section 2965 of the Civil Code of California.

Appellant completely disregarded the provisions of *section 2966* and sold the property at private sale pursuant to the power given in the mortgage instead of disposing of it as a pledge as required when the property is out of the county for more than thirty days. This being a statutory procedure, there must be full compliance.

Hopper v. Keys, 152 Cal. 488.

If Appellant's contention that mere taking of possession complies with the code requirements is to be given consideration, then the words "as prescribed in the next section" contained in section 2965, are to be completely disregarded. Yet Appellant does not want to go quite this far, but argues that we can reconcile 2966 with its interpretation by deleting therefrom the words "and dispose of the property as a pledge for the payment of a debt, though the debt is not due." The answer to these abortive arguments is that if the legislature intended such construction it would have so provided. Section 2966 could have been omitted entirely. Appellant not only failed to comply with the requirements above set forth, but proceeded in accordance with the provisions of his mortgage, independently of the section.

II.

EFFECT SHOULD BE GIVEN TO EVERY PART OF A CODE SECTION, IF POSSIBLE, TO THE END THAT THE DIFFERENT PROVISIONS ARE HARMONIZED.

Personal property mortgages exist and have their basis under the provisions of the Civil Code. Appellant's position would render meaningless the concluding clause of section 2965 "as prescribed in the next section." This contention is not supported by any authority and disregards the accepted rules of statutory interpretation. The two Code sections above set forth are in *pari materia*. The words quoted point to the nature of the possession required in order to revive the mortgage. They are words of qualification. Mere possession does not satisfy the statute but possession as prescribed by section 2966, namely for the purpose and to the end of selling the property "as a pledge for the payment of the debt". Appellant's possession was not for that purpose, but for the purpose of sale under the terms of the mortgage.

The intent of the legislature must be considered in the interpretation of these provisions. The legislature did not intend to use meaningless or purposeless words and there can be no presumption to the contrary.

French v. Teschemaker, 24 Cal. 518, 557.

Words should never be considered unnecessary and surplusage if a reasonable construction can be adopted which will give force to and preserve all of the terms of the statute. It is a cardinal rule of construction of statutes that some effect must be given

to every word and clause, if possible. Words in a statute should never be construed as unnecessary if a reasonable construction can be adopted which will give force to and preserve all the words of the statute.

People v. Perkins, 85 Cal. 509, 511;
Gates v. Salmon, 35 Cal. 576, 587;
Langenour v. French, 34 Cal. 92, 98 and 99;
Edwards v. Sweigert, 15 Cal. App. 503, 507;
Rumetsch v. Oakland, 135 Cal. App. 267, 269;
Davidson v. Burns, 38 Cal. App. (2d) 188, 191;
Los Angeles Co. v. Emme, 42 Cal. App. (2d) 239, 242.

Appellant contends that the trial court has rewritten section 2965 to read as follows: "2. The Mortgagee takes possession of the property *and sells* as prescribed in the next section." (Italics ours.) Appellant's own contention would deprive section 2966 of all meaning and would eliminate the words "and dispose of the property as a pledge for the payment of a debt" from section 2966. Appellant by these contentions is endeavoring to play with words. The only interpretation of these sections that Appellee requests is to give the words used their literal meaning as intended by the legislature, and interpreted by the court below.

Gates v. Salmon (supra).

The section is clear as contained in the Code.

Thus Appellant's failure to heed all of the provisions of sections 2965 and 2966 was fatal to its attempt to revive the lien of the mortgage.

III.

THE MORTGAGED PROPERTY HAVING BEEN EXEMPTED FROM THE OPERATION OF THE MORTGAGE, APPELLANT IS IN THE SAME POSITION AS A MORTGAGEE HAVING POSSESSION UNDER AN UNRECORDED CHATTEL MORTGAGE.

Since Appellant failed to revive the mortgage by either of the two methods mentioned in section 2965 the property remained exempted from its operation. Appellant was in no better position at the time of the sale than a mortgagee in possession under an unrecorded chattel mortgage.

Loosemore v. Baker, 175 Cal. 420;
Chelhar v. Acme Garage, 18 Cal. App. (2d) 775, 781.

The taking of possession and selling at private sale within four months of the filing of the Petition in Bankruptcy at a time when the Bankrupt was insolvent and Appellant had reasonable cause to believe the Bankrupt to be insolvent was a preference. (Amend. to Stip. T.R. p. 14.) The preference is voidable at the instance of a Trustee in Bankruptcy.

11 U.S.C. § 96b: Bankruptcy Act § 60b;[2]
Noyes v. Bank of Italy, 206 Cal. 266.

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[2] "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value * * *"

IV.

THE TRUSTEE IN BANKRUPTCY IS VESTED AS OF THE DATE OF BANKRUPTCY WITH ALL THE RIGHTS, REMEDIES, AND POWERS OF A JUDGMENT CREDITOR THEN HOLDING AN EXECUTION DULY RETURNED UNSATISFIED, WHETHER OR NOT SUCH CREDITOR EXISTS.[3]

Section 2965 provides that when the property has been permitted to remain out of the county in which it was originally situated for more than thirty days, the property mortgaged is exempted from the operation of the mortgage except as between the parties. The Trustee in Bankruptcy is vested, as of the date of bankruptcy, with the same rights, remedies and powers as a judgment creditor then holding an execution lien unsatisfied, whether or not such creditor actually exists.

11 U.S.C. § 110c: Bankruptcy Act § 70c.

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[3]11 U.S.C. § 110c: Bankruptcy Act § 70c. "The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

V.

SECTIONS 2965 AND 2966 OF THE CALIFORNIA CIVIL CODE AS AMENDED IN 1935 RELIEVE MORTGAGEE OF A HARDSHIP. THE FAILURE OF APPELLANT TO COMPLY WITH THESE CODE SECTIONS CREATED ANY PURPORTED HARDSHIP.

Appellant seems appalled by the idea that under the proper construction of the statutes, after a mortgagee takes possession under 2965 and prior to the pledge sale under 2966, a judgment creditor could levy an execution on the property. Appellant could prevent this by the simple expedient of recording the mortgage in the county to which the property had been moved in accordance with the provisions of section 2965, sub-paragraph 1.

Appellant cannot claim hardship or inequity as a result of its own omissions. The rights obtained under its original mortgage were received by virtue of express statutes applicable thereto. The lien was lost, except as between the parties thereto, by failure to follow the provisions of these same statutes. An opportunity was provided by statute for the revival of the mortgage but by its failure to follow a procedure expressly set forth for its benefit, Appellant lost its opportunity.

Calif. Civil Code 2965, 2966.

Although we do not believe that Appellant could suffer any hardship from following the procedure set forth in the above sections, the fact that some hardship might arise from failure to comply with them fully would not prevent the application of the sections.

Edwards v. Sweigert, 15 Cal. App. 503.

CONCLUSION.

It is submitted that when the mortgaged property was admittedly exempted from the operation of mortgage after its removal from San Joaquin County for more than thirty days and Appellant failed to either record the mortgage in Stanislaus County or to take possession and dispose of the same as a pledge under the provisions of sections 2965 and 2966 of the Civil Code of California, the mortgage was not revived; that the sale of the mortgaged property within four months of bankruptcy by Appellant effected a preference voidable at the instance of the Trustee in Bankruptcy; and that the judgment of the District Court in favor of Appellee should be sustained.

Dated, San Francisco, California,
September 6, 1950.

Respectfully,
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